No. 76-246

In the Supreme Court of the United States

OCTOBER TERM, 1976

ARTHUR VELASCO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A2-A6) is reported at 539 F. 2d 707.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1976. A petition for rehearing *en banc* was denied on July 19, 1976 (Pet. App. A1). The petition for a writ of certiorari was filed on August 18, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a ruling by the trial court, excluding proffered expert testimony concerning the different species of marihuana, deprived petitioners of due process.

STATUTE INVOLVED

21 U.S.C. 802(15), provides:

> The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

STATEMENT

After a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted on one count of conspiracy unlawfully to import a controlled substance (marihuana) into the United States, in violation of 21 U.S.C. 963, and on one substantive count of unlawful importation of marihuana, in violation of 21 U.S.C. 952(a) and 960. Petitioner Ferguson was also convicted of possession of marihuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1).[1] Petitioners Zambito, Pruitt and Moody were each sentenced to four years' imprisonment on the conspiracy count and four years on the substantive count, to be served consecutively. Petitioners Velasco and Tatum were

[1]Three of the indicted coconspirators (Bass, Dove and Wood) were acquitted, and two others (Cochran and Evans) have not yet been arrested.

sentenced to consecutive terms of two years' imprisonment on the two counts. Petitioner Ferguson was sentenced to three consecutive one-year terms. The court of appeals affirmed *per curiam* (Pet. App. A2-A6).

The indictment in this case charged petitioners and others with conspiracy to import marihuana into the United States (Count I) and importation of approximately 15,000 pounds of marihuana into the United States (Count II) (App. 1-5).[2] The indictment also charged petitioner Ferguson and others with possession of approximately 15,000 pounds of marihuana with intent to distribute (Count III) (App. 5).

At trial the government introduced the expert testimony of a chemist, Andrew C. Allen. Allen testified that he analyzed the seized contraband by subjecting the plant matter to four different tests (App. 22-25). Based upon these examinations, Allen concluded that the substance in question was marihuana, specifically Cannabis sativa L. (App. 25, 44). Allen further stated that only one species of marihuana exists (App. 29).

The defense proffered the testimony of a taxonomist, Dr. Lauren C. Anderson, an expert in the identification and classification of plants. He testified that the seized drug was Cannabis (App. 69); that marihuana or Cannabis is of the plant family denominated Cannabaceae (App. 47); and that the genus Cannabis is polytypic, having three species (sativa, indica and ruderalis) (App. 47-56). His testimony indicated that the particular species could not be determined by the government's tests since the characterization of species is within the realm of the taxonomist and generally not within that of the chemist

[2]"App." refers to the appendix filed in the court of appeals, a copy of which we are lodging with the Court.

(App. 57-59). He also testified he could not tell with reasonable certainty to what species the seized drug belonged (App. 62).

The trial court held that Dr. Anderson's proffered testimony was inadmissible and instructed the jury "that the exact species of marijuana is immaterial under the law * * *" (App. 72).

ARGUMENT

Petitioners contend (Pet. 18 *et seq.*) that the trial court, by improperly excluding proffered expert testimony concerning the different species of marihuana, prevented them from rebutting the government's proof that the substance in question was derived from Cannabis sativa L., the plant defined as marihuana in 21 U.S.C. 802(15). They argue that, as a matter of statutory construction, the reference to Cannabis sativa L. in 21 U.S.C. 802(15) excludes all other species of the plant and that the trial court's ruling denied them their right to fair and adequate notice and due process of law. The court of appeals below, like every court of appeals that has considered this "species" defense, properly rejected these contentions.

Affirming a similar denial of proferred testimony, the Court of Appeals for the Second Circuit has stated (*United States* v. *Rothberg*, 480 F. 2d 534, 536, certiorari denied, 414 U.S. 856):

> The most that the proffered proof could have established was that at the time of trial there was some and perhaps growing botanical opinion that Cannabis is polytypal and that a distinction can be made between Cannabis Sativa L. and Cannabis Indica Lam. * * * [U]p to the time of the offense, there is no question but that the lawmakers, the general public and overwhelming scientific opinion considered that there was only one species of marihuana * * *. *See* Leary v. United States, 395 U.S. 6, 50 * * *. Whether this is scientifically exact or not, the statute provided at the time of the offense a sufficient description of what was intended to be prohibited to give notice to all of the illegality of appellant's actions.

Accord, *United States* v. *Kinsey*, 505 F. 2d 1354 (C.A. 2).

That position has been adopted by every other circuit that has considered the issue. *United States* v. *Honneus*, 508 F. 2d 566 (C.A. 1), certiorari denied, 421 U.S. 948; *United States* v. *Moore*, 446 F. 2d 448 (C.A. 3), certiorari denied, 406 U.S. 909; *United States* v. *Gaines*, 489 F. 2d 690 (C.A. 5); *United States* v. *Burden*, 497 F. 2d 385 (C.A. 8); *United States* v. *King*, 485 F. 2d 353 (C.A. 10); *United States* v. *Walton*, 514 F. 2d 201 (C.A. D.C.); compare *United States* v. *Lewallen*, 385 F. Supp. 1140 (W.D. Wis.). Moreover, the legislative history of the Marihuana Tax Act of 1937, 50 Stat. 551, the amendment of 1954, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236, demonstrate that Congress intended to outlaw all plants known as marihuana to the extent that those plants possessed the active ingredient tetrahydrocannabinol (THC).[3] The evidence

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[3]See, *e.g.*, H.R. Rep. No. 792, 75th Cong., 1st Sess. 3-4 (1937); S. Rep. No. 900, 75th Cong., 1st Sess. 4 (1937); Hearing on H.R. 6906 before a Subcommittee of the Senate Committee on Finance, 75th Cong., 1st Sess. 14, 23-24 (1937); Hearing on H.R. 6385 before a Subcommittee of the House Committee on Ways and Means, 75th Cong., 1st Sess. 18-42, 55, 60-61, 71-72, 76-78, 90-122 (1937); H.R. Rep. No 91-1444 (Part 1), 91st Cong., 2d Sess. (1970); 116 Cong. Rec. 33603, 33667, 35484-35559, 36651, 36655, 36880, 36885 (1970).

in this case showed that the seized drug contained THC (App. 69-70).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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